



## INTERIOR BOARD OF INDIAN APPEALS

Elizabeth De Marr

3 IBIA 14 (07/11/74)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

## ADMINISTRATIVE APPEAL OF ELIZABETH DE MARR, ET AL.

IBIA 74-22-A

Decided July 11, 1974

Appeal from a decision granting a right-of-way.

Reversed and remanded.

APPEARANCES: Elizabeth De Marr, Frances De Nasha and William G. Winters, pro se.

### OPINION BY ADMINISTRATIVE JUDGE SABAGH

The above-entitled matters came before the Board on an appeal from the decision of the Minneapolis Area Director, Bureau of Indian Affairs, dated September 30, 1971, approving the grant of a road right-of-way consisting of 1.33 acres to the Town of Hunter, Sawyer County, Wisconsin, across the Lac Courte Oreilles allotment of Terise, No. 6 described as NE 1/4 SE 1/4 Sec. 4, T. 39 N., R. 7 W., 4th P.M., Wisconsin.

It appears from the record that the Town of Hunter, intending to eliminate a very steep hill and dangerous curve, filed an application with the Superintendent, Bureau of Indian Affairs, Great Lakes Agency, for a right-of-way for highway purposes affecting restricted allotted lands within the Lac Courte Oreilles Indian Reservation.

The allotment in question was inherited from Julia Boyd Thomas on November 27, 1952, by the following heirs:

William G. Winter	Son	1/4
Elizabeth H. De Marr	Daughter	1/4
Frances N. De Nasha	Daughter	1/4
Vincent Thomas	Son	1/4

The Act of February 5, 1948, provides that:

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands

now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations \* \* \*. (Emphasis supplied.) (62 Stat. 17, 25 U.S.C. § 323 (1970))

The regulations promulgated by the Secretary of the Interior concerning rights-of-way over Indian Lands are set out in 25 CFR 161. Pertinent provisions follow:

Section 161.3(b) provides that--

Except as provided in paragraph (c) of this section, no right-of-way shall be granted over and across any individually owned lands nor shall any permission to survey be issued with respect to any such lands, without prior written consent of the owner or owners of such lands and the approval of the Secretary.

Section 161.3(c) provides in part that--

The Secretary may issue permission to survey with respect to, and he may grant rights-of-way over and across individually owned lands without the consent of the individual Indian owners when \* \* \* (3) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant \* \* \*.

After the application of right-of-way was received from the Town of Hunter, the Superintendent indicates that letters with consent forms were mailed to three of the aforementioned heirs at their last-known addresses on February 3, 1971. Mr. Thomas returned his consent form properly signed and witnessed on February 17, 1971. The letters addressed to Elizabeth De Marr and Frances De Nasha were returned on February 5 and 11, 1971, respectively, stamped "unknown" and "no such number." One heir, William Winter, was thought to be deceased based on evidence which the record does not reveal.

The Superintendent further indicates that when objection to the right-of-way was investigated in the field, it was learned that William Winter was very much alive and residing on the Lac Courte Oreilles Reservation. It further appears that Elizabeth De Marr and Frances De Nasha lived at Newport, Couderay, Wisconsin. It

appears that checks in the amount of \$10 each were mailed to and received by Vincent Thomas, William Winter, Elizabeth De Marr and Frances De Nasha.

The record is void of evidence as to when the checks were sent to the heirs. Moreover, no correspondence appears to have accompanied the checks explaining why the heirs were receiving the checks.

In addition, the record is void of information explaining how the Superintendent was able to subsequently discover the addresses and whereabouts of Elizabeth De Marr and Frances De Nasha in order to forward them the checks. Moreover, consent forms were never signed by them.

It is elementary that these Indian heirs have property rights and vested interests in the allotted land. It is equally basic that the Bureau of Indian Affairs as the representative of the Secretary and as Trustee of these individual Indians is entrusted with the responsibility of protecting these rights regardless of how insignificant they may appear monetarily.

We cannot agree that the Bureau exercised that proper degree of care required of a Trustee in this instance, namely, of locating and notifying Elizabeth De Marr, Frances De Nasha, and William Winter of the Application of the Town of Hunter. Consequently, we find that proper notice was not afforded to Elizabeth De Marr, Frances De Nasha, and William Winter. We further find that the cashing of the checks did in no way mitigate against them. We find that written consent was required and was not given by these three heirs. We further find that Section 161.3(c) referred to supra is not applicable here.

Obviously, neither the efforts expended by the Town in preparing the right-of-way, nor the fact that the Town of Hunter may eventually choose to condemn the property in question pursuant to the Act of March 3, 1901 (31 Stat. 1084, 25 U.S.C. § 357 (1970)) is of consequence here.

NOW, THEREFORE, by virtue of the special authority delegated to the Board of Indian Appeals by the Secretary of the Interior, the decision of the Minneapolis Area Office approving the grant of right-of-way to the Town of Hunter is REVERSED and REMANDED for appropriate action consistent with the views and findings set forth herein, namely that the application for the Grant of the Right-of-Way be considered de novo in the event that the Town of Hunter should choose to go that route.

This decision is final for the Department.

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//original signed  
Mitchell J. Sabagh  
Administrative Judge

I concur:

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//original signed  
David J. McKee  
Chief Administrative Judge